SUPREME COURT, U.S.
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No. 09-964

In The
Supreme Court of the United States

WILLIAM A. McGOWAN,

Petitioner,

v.

DEERE & CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. MC GOWAN DID NOT MATERIALLY MISSTATE THE RECORD. 1

II. THERE IS A MERGER DOCTRINE IN THE SEVENTH CIRCUIT THAT WARRANTS REVIEW. 4

TABLE OF AUTHORITIES

CASES

Peirick v. Indiana University-Purdue University Indianapolis,
510 F.3d 681 (2007) 4

I. MC GOWAN DID NOT MATERIALLY MISSTATE THE RECORD.

Deere opens its opposition by quoting McGowan's brief in the Court of Appeals selectively and out of context. Deere takes less than one sentence from that brief out of context and repeats it on pages 1, 12, 14, and 18 of its brief in opposition. Deere's misquotation is no reason to deny certiorari.

Deere quotes from McGowan's statement of facts in his opening brief in the Court of Appeals as follows:

> Deere and its consulting physician, Dr. Candler, believed that such a [twenty-five (25) pound] restriction was appropriate.

(Brief in Opposition at 1, 12 (bracketed material exactly as in the brief in opposition).)

The full paragraph that McGowan actually wrote reads:

> In August of 2004, however, Deere's doctor, William O. Candler, D.O., insisted that McGowan was permanently restricted from lifting more than 25 pounds. (C.110, 123.) Apparently to resolve the discrepancy, Deere ordered a functional capacity evaluation of Mr. McGowan. (C.124.) The discrepancy was that McGowan and his treating physician, Dr. Lanzino, did not believe that McGowan was restricted from lifting more than 25 pounds and Deere and its

> consulting physician, Dr. Candler, believed that such a restriction was appropriate.

In writing this paragraph, McGowan did not concede the honesty of Candler's belief. Rather, McGowan was simply presenting the evidence below without argument, as required. Notably the Court of Appeals did not use that language to affirm. Thus, the statement is no reason to deny certiorari.

Deere's correctly observes on pages 2 and 3 of its brief that the record does not reveal that Dr. Candler ordered the functional capacity examination warrant denying certiorari. Deere's observation does not affect the merits of this case.

Deere correctly points out on page 3 of its brief that Deere did not admit in its answer that McGowan was injured in Deere's plant. But McGowan was in fact injured on at Deere's plant. Deere did not deny that allegation in the summary judgment proceedings, satisfied to object to it then as "[i]mmaterial." (C.307.) McGowan testified in his deposition that he injured his back while at work:

> I was running parts, and it was very heavy parts, and we were sort of behind, and I was being pushed, and those parts at that time come from outside, and I think there was rain on them, and they was oily, and when I went to pull apart, I pulled two of them.

(C.109.)

The absence of an admission in Deere's answer is no reason to deny certiorari.

Similarly, the fact that Deere did not admit in its answer that Dr. Lanzino cleared McGowan for work with only temporary lifting restrictions does not affect the merits of this case. Dr. Lanzino and his nurse wrote:

> We feel that he would be able to go back to work on Monday and we would like him not to lift over 50 pounds for one month and then he should be able to go up to full duty at that time.

(C.187.)

Nor did McGowan unfairly characterize the motion for summary judgment as Deere alleges on page 4 of its brief. McGowan never suggested that the sole basis for the motion was an inability to prove pretext.

Deere errs when it argues on page 4 of its brief that McGowan presented no proof from his own doctor that he did not have a 25-pound lifting restriction. Indeed, the letter from Dr. Lanzino and his nurse, and a subsequent note from the nurse, are in fact such proof. (C.186-87.)

II. THERE IS A MERGER DOCTRINE IN THE SEVENTH CIRCUIT THAT WARRANTS REVIEW.

Deere argues on page 7 of its brief that there is no merger doctrine in the Seventh Circuit. Yet the Seventh Circuit holds:

> Where, as here, an employee claims that she 'performed satisfactorily and the employer is lying about the business expectations required for the position, the second prong and the pretext question seemingly merge because the issue is the same – whether the employer is lying.'"

(*Peirick v. Indiana University-Purdue University Indianapolis*, 510 F.3d 681, 687 (2007).)

As established by Deere's inability to find any commentary from any other Court of Appeals on this unique, thirteen-year-old doctrine, this Court should it.

For the foregoing reasons, McGowan respectfully requests a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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